



# Massachusetts Law Quarterly

Special Number, December, 1918

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## INTRODUCTORY NOTE.

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A special number of this magazine was issued in April, 1918, containing the *Soldiers' and Sailors' Civil Relief Act* and information in regard to its meaning and application, and copies of this were distributed, not only to members of the association, but an extra supply of copies was printed and distributed to lawyers connected with the Red Cross stations throughout New England and, in compliance with requests, to other parts of the country.

In the same way, this special number is issued, containing information in regard to the war legislation of Congress, prepared primarily for the assistance of Red Cross workers but likely to be of practical assistance also to members of the association in general who may be called upon to advise in regard to these acts which are not generally well understood.

The first article in regard to the *War Risk Insurance Act* and the *Vocational Rehabilitation Act* was prepared by Ernest B. Luce, Esq., of Salem, who is connected with the New England Division of the American Red Cross and has become the best-informed man in regard to the administrative detail provided by these acts.

The discussion in regard to the *Civil Relief Act* was prepared by Reginald H. Smith, Esq., counsel for the Home Service Section of the Boston Metropolitan Chapter of the Red Cross and for the Boston Legal Aid Society.

An extra supply of this special number has been printed for distribution to Red Cross workers.

The discussion of the opinion in *Hoffman v. Charlestown Five Cents Savings Bank* is also added to this number because it relates to the practical problems likely to arise in connection with advising soldiers or sailors or those dealing with them.

PUBLICATION COMMITTEE,

F. W. GRINNELL, *Secretary.*

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THE WAR RISK INSURANCE ACT AND THE VOCATIONAL REHABILITATION ACT IN RELATION TO MEN DISCHARGED FROM MILITARY OR NAVAL SERVICE AND THE END OF THE WAR.

*(This paper was prepared primarily for the information of Red Cross workers, but is here printed for the information of the bar in general.)*

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## I. INTRODUCTORY.

1. *The War Risk Insurance Act is War Legislation.*

(a) The Military and Naval Insurance Provisions of the War Risk Insurance Act became law on October 6th, 1917. The law was amended on February 12th, 1918, and again on June 25th, 1918. Some of its provisions will not continue after the termination of the present war emergency except by new legislation.

(b) Because of the tremendous responsibility placed upon the Home Service Section in giving accurate information and helpful assistance to discharged men, in order to protect fully the interests of these men and their families, these instructions have been prepared. They are designed mainly for the legal work connected with Red Cross Home Service. This work will deal very largely with insurance, compensation, and the rights of men disabled in the service, and much less than formerly with allotments and allowances.

(c) The necessity for a restatement of Government provisions comes as a result of the armistice and demobilization of troops. Such questions as the following are now being asked:

- (1) How do I pay my insurance premiums?
- (2) When is the premium due?
- (3) When will my insurance lapse?
- (4) If I allow my insurance to lapse can I become reinstated? How?
- (5) In what period of time can I become reinstated if my insurance lapses?
- (6) If I am disabled in line of duty what will the Government do for me?

## II. GENERAL PROVISIONS.

### 1. *Rules and Regulations of Bureau of War Risk Insurance.*

(a) The Director of the Bureau of War Risk Insurance has authority to make rules and regulations not inconsistent with the Act and shall decide all questions arising under the Act. The Director shall regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation or insurance. (Sec. 13.)

### 2. *Fees of Attorneys.*

(a) Payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed \$3 in any one case. (Sec. 13.)

(b) No claim agent or attorney shall be recognized in the presentation or adjudication of claims except that in the event of disagreement as to a claim under the contract of insurance between the Bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall

be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid. (Sec. 13.)

3. *Bureau Shall Make Use of Surgeons in the Army and Navy.* (Sec. 14.)

(a) It is also authorized to utilize the services of other reputable physicians or surgeons.

4. *Military and Naval Pay Deposit Fund.*

(a) The authority given to the Secretary of War and the Secretary of the Navy to withhold pay in case the enlisted man did not allot at least one half, has not been exercised by either of these Government Officials. (Sec. 203.)

5. *Proof of Marriage Must be Shown.*

(a) By a duly verified copy of a public or church record; or,

(b) By the affidavit of the clergyman or magistrate who officiated; or,

(c) By the testimony of two or more eye witnesses to the ceremony; or,

(d) By a duly verified copy of the church record of baptism of the children; or,

(e) By the testimony of two or more witnesses who know that the parties lived together as husband and wife, and were recognized as such, and who shall state how long, within their knowledge, such relations continued: Provided, That marriages, except such as are mentioned in Section Forty-seven Hundred and Five of the Revised Statutes, shall be proven in compensation or insurance cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to compensation or insurance accrued; and the open and notorious illicit cohabitation of a widow who is a claimant shall operate



to terminate her right to compensation or insurance from the commencement of such cohabitation: Provided further, That for the purpose of the administration of Allotments and Allowance Provisions marriage shall be conclusively presumed, in the absence of proof, that there is a legal spouse living, if the man and woman have lived together in the openly acknowledged relation of husband and wife during two years immediately preceding the date of the declaration of war, or the date of enlistment or of entrance into or employment in active service in the military or naval forces of the United States if subsequent to such declaration. (Sec. 22.)

6. *Terms (unless the Context Otherwise Requires).*

(a) The term "child" includes—

- (1) A legitimate child.
- (2) A child legally adopted more than six months before the enactment of this amendatory Act or before enlistment or entrance into or employment in active service in the military or naval forces of the United States, whichever of these dates is the later.
- (3) A stepchild, if a member of the man's household.
- (4) An illegitimate child, but, as to the father, only if acknowledged by instrument in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, and if such child, if born after December thirty-first, nineteen hundred and seventeen, shall have been born in the United States, or in its insular possessions.

(b) The term "grandchild" means a child as above defined of a child as above defined.

(c) Except as used in relation to insurance, the terms "child" and "grandchild" are limited to unmarried persons either (a) under eighteen years of age, or (b) of any age, if insane, idiotic, or otherwise permanently helpless.

(d) The term "parent" includes a father, mother, grandfather, grandmother, father through adoption, mother through adoption, stepfather, and stepmother, either of the person in the service or of the spouse.

(e) The terms "brother" and "sister" include brothers and sisters of the half blood as well as those of the whole blood, stepbrothers and stepsisters and brothers and sisters through adoption.

(f) The term "commissioned officer" includes a warrant officer, but includes only an officer in active service in the military or naval forces of the United States.

(g) The terms "man" and "enlisted man" mean a person, whether male or female, and whether enlisted, enrolled, or drafted into active service in the military or naval forces of the United States, and include noncommissioned and petty officers, and members of training camps authorized by law.

(h) The term "enlistment" includes voluntary enlistment, draft, and enrollment in active service in the military or naval forces of the United States.

(i) The term "commissioner" means the Commissioner of Military and Naval Insurance.

(j) The term "injury" includes disease.

(k) The term "pay" means the pay for service in the United States according to grade and length of service, excluding all allowances.

(l) The term "military or naval forces" means the Army, the Navy, the Marine Corps, the Coast Guard, the Naval Reserves, the National Naval Volunteers, and any other branch of the United States service while serving pursuant to law with the Army and the Navy. (Sec. 22.)

#### *7. Minors.*

(a) When payment is to be made to a minor or to a person mentally incompetent, such payment shall be made to the person who is the constituted guardian or curator by the laws of the state of residence of claimant, or is otherwise legally vested with responsibility or care of the claimant. (Sec. 23.)

#### *8. Private Life Insurance Policies.*

(a) The War Risk Insurance Bureau upon application has acted in an advisory capacity with respect to any contracts of insurance whether with the Government or otherwise for persons in the military or naval forces in protecting

the interests of the insured and beneficiary. This section was enlarged by provisions added to the Soldiers' and Sailors' Civil Relief Act. (Sec. 24.)

9. *Government Checks not Assignable.*

(a) The allotments and family allowances, compensation and insurance, are not assignable, and shall not be subject to the claims of creditors and shall be exempt from all taxation. (Sec. 28.)

10. *Insurance and Compensation Rights Barred.*

(a) The discharge or dismissal of any person from the military or naval forces for any of the following reasons will terminate compensation and insurance rights. (Sec. 29.)

- (1) Enemy Alien.
- (2) Conscientious Objector.
- (3) Deserter.
- (4) Guilty of Mutiny.
- (5) Guilty of Treason.
- (6) Guilty of Spying.
- (7) Offence involving Moral Turpitude.
- (8) Willful and persistent misconduct.

References in parentheses hereinafter or hereinbefore used are to the Sections of the War Risk Insurance Act or to Treasury Department Decisions.

### III. INSURANCE.

1. *Lapse of Insurance.*

(a) Insurance shall lapse and terminate if, at the expiration of a period of thirty-one days after the insured leaves the active military or naval service for reasons other than those stated in Section 29 of the War Risk Insurance Act, the whole or any part of premiums which were in arrears at the time of his so leaving the service remains unpaid, or if at any time after so leaving the service the whole or any part of any premium thereafter accruing is not paid promptly when due or within thirty-one days thereafter. (T. D. Decision, Sept. 20, 1918.)

## *2. Termination of Insurance.*

(a) Insurance shall terminate upon discharge or dismissal of the insured for any of the reasons stated in Section 29 of the War Risk Insurance Act.

## *3. Regulations Regarding Reinstatement. (T.D., Sept. 20, 1918.)*

(a) If the insurance has lapsed for nonpayment of premiums after the insured has left the active military or naval service for reasons other than those stated in Section 29 of the War Risk Insurance Act, or physical disability, such insurance may be reinstated (a) if application is made at any time within thirty-one days after the date of lapse without evidence of insurability and on proof satisfactory to the Bureau that the applicant is not permanently and totally disabled, and (b) if application is made at any time subsequent to thirty-one days and within six months after the date of lapse upon certification of insurability satisfactory to the Bureau by at least two reputable physicians or surgeons.

(b) In every case where reinstatement of lapsed insurance is desired the applicant shall file with the Bureau of War Risk Insurance a written application therefor, making tender of all sums which would have become payable as premiums if such insurance had not lapsed. Such application should be sworn to, and shall be accompanied by, or within thirty-one days shall be supplemented with, a certificate which in each instance shall be sworn to, and shall set forth the name and present address of the applicant, the military or naval organization with which he is or was connected, the amount of insurance that has lapsed, and the date on which the last premium was paid. Such certificate shall also contain a statement as to the condition of the applicant's health at the time at which such application is made, and in case he is no longer in the active military or naval service it shall contain a full explanation of the reasons which caused his discharge or dismissal from such service, and whether such discharge or dismissal was honorable.

(c) Where such application for reinstatement is made more than thirty-one days after the date of lapse, the applicant, if still remaining in the active military service, shall

attach to the certificate referred to a health certificate, in form satisfactory to the Bureau and duly signed by an Army or Naval surgeon or other official medical board of the Army or Navy, or, in the case no such physician or board is accessible, by at least two reputable physicians or surgeons, showing to the satisfaction of the Bureau that such applicant is at the date of such application in sound health and insurable; or if no longer in active military or naval service, shall attach a health certificate in form satisfactory to the Bureau and duly signed by at least two reputable physicians, showing to the satisfaction of the Bureau that the applicant is at the time of such application in sound health and insurable.

*4. Kind of Insurance during the War.*

(a) During the period of the war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. (Sec. 404.)

*5. Premiums.*

(a) Premiums must be sent by discharged men directly to the Bureau of War Risk Insurance, Attention of Insurance Section, Treasury Department, Washington, D.C. Checks or money orders are to be drawn to the order of the Treasurer of the United States.

*6. Rates.*

(a) Rates change on July 1st of each year.

(b) Table of Rates: Each \$1,000 of insurance is payable in installments of \$5.75 per month for 240 months; but if the insured is totally and permanently disabled and lives longer than 240 months, the payments will be continued as long as he lives and is so disabled.

Age.	Monthly Premium.	Age.	Monthly Premium.
15.....	\$0.63	41.....	\$0.82
16.....	.63	42.....	.84
17.....	.63	43.....	.87
18.....	.64	44.....	.89
19.....	.64	45.....	.92
20.....	.64	46.....	.95
21.....	.65	47.....	.99
22.....	.65	48.....	1.03
23.....	.65	49.....	1.08
24.....	.66	50.....	1.14
25.....	.66	51.....	1.20
26.....	.67	52.....	1.27
27.....	.67	53.....	1.35
28.....	.68	54.....	1.44
29.....	.69	55.....	1.53
30.....	.69	56.....	1.64
31.....	.70	57.....	1.76
32.....	.71	58.....	1.90
33.....	.72	59.....	2.05
34.....	.73	60.....	2.21
35.....	.74	61.....	2.40
36.....	.75	62.....	2.60
37.....	.76	63.....	2.82
38.....	.77	64.....	3.07
39.....	.79	65.....	3.35
40.....	.81		

#### 7. *Insurance Converted to Other Forms.*

(a) Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance which you have been carrying shall be converted, without medical examination, in accordance with the provisions of the law and the regulations of the Bureau, into ordinary life, twenty payment life, endowment maturing at the age of sixty-two, and into other usual forms of insurance. This converted insurance will continue to be Government insurance. Every person holding this insurance owes it to himself and to his family to hold on to Uncle Sam's insurance. It is the strongest, safest, and cheapest life insurance ever written. The right to continue it is a valuable right given by the Government to our fighting men. If this right is lost by allowing the insurance to lapse for six months the holder

cannot again obtain insurance except from private companies, at a considerable increase in cost. Moreover, many of the men may have become uninsurable through physical impairment, and if they allow their insurance to lapse they of course will lose the last opportunity for themselves and their families to have the protection of life insurance.

#### 8. *Total Permanent Disability and Death.*

(a) The one year renewable term insurance, carried while in the service and which can be continued after discharge for five years after peace is proclaimed by the President, protects the insured against total permanent disability and death.

#### 9. *Reserve Value.*

(a) The one year renewable term insurance granted to those in the service has no reserve value. If a person who has paid his premium regularly is now discharged and is not totally and permanently disabled, he has nothing coming to him from the Government by virtue of his insurance. His premiums gave him *protection only* against total permanent disability and death. This one year renewable term, or protective insurance, may be converted within five years into kinds of insurance which do have reserve value. The reserve value of such policies, in case of death of the insured, will go to the estate of the insured in case the insured dies intestate or leaves no heir within the group specified in the Act. The protection given to men in the service through the Government insurance is like the protection given to the owner of a house through fire insurance. During the war one kind of insurance only was given. It gave protection only, having no investment feature. After conversion, Government policies will provide for both protection and investment.

#### 10. *When Premiums are Due.*

(a) The only clause in the War Risk Insurance Act itself regarding the date when premiums become due is the following:

"Payments of premiums in advance shall not be required for periods of more than one month each."

(b) All other statements regarding dates when premiums are due, when policies lapse, etc., come under the rules and regulations of the Bureau and from decisions rendered under the provisions of the Act. The latest rules and decisions should therefore be consulted and followed. (See Lapse and Reinstatement.)

#### 11. *Persons Entitled to Hold Insurance.*

(a) The following persons are entitled to hold insurance while in active service and likewise have the right to convert insurance within the five year period:

- (1) Commissioned Officers.
- (2) Enlisted Men.
- (3) Member of Army Nurse Corps (female).
- (4) Member of Navy Nurse Corps (female).

#### 12. *Beneficiaries.*

- (a) Spouse.
- (b) Child.
- (c) Grandchild.
- (d) Parent.
- (e) Brother.
- (f) Sister.
- (g) Injured Person (in case of total and permanent disability).

The insured has perfect liberty of action in naming a beneficiary within the group. He can change the beneficiary at any time by giving his directions to the Bureau in proper form, duly witnessed. No one has a right, except the insured himself, to reveal the identity of the beneficiary. This is held to be confidential matter between the Government and the insured. The beneficiary has no vested interest in the insurance. If a beneficiary dies after receiving certain payments the balance of the insurance payments will go to the next of kin within the group as determined by the laws of the Commonwealth in which the insured was resident.

The insured can name one, two, or more beneficiaries in succession, thus determining to the last one in the group who shall receive the benefits of insurance. Beneficiary may be named by last will and testament. A change of beneficiary



shall, wherever practicable, be made upon blanks prescribed by the Bureau. The change can, however, be made without use of the prescribed blank in writing and witnessed by at least one person.

*13. Dependency and Insurance.*

(a) There is no question of dependency in relation to insurance benefits.

*14. Automatic Insurance.*

(a) "Any person in the active service on or after the sixth day of April, 1917, who, while in such service and before (Feb. 12, 1918), becomes or has become totally and permanently disabled, or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance payable to such person during his life, in monthly installments of \$25 each. If he shall die either before he shall have received installments or before he shall have received two hundred and forty of such monthly installments, then \$25 per month shall be paid to his widow from the time of his death and during her widowhood, or if there is no widow surviving him, then to his child or children, or if there is no child surviving him, then to his mother, or if there is no mother surviving him, then to his father, if and while they survive him." (Sec. 401.)

*15. Number of Insurance Payments on the One Year Renewable Term Unconverted Policies.*

(a) Insurance is paid in two hundred and forty equal monthly installments. It is not paid in a lump sum. The aggregate payments on a \$10,000 policy amount to \$13,800. If insurance is paid to the insured because of total and permanent disability, payments continue for life.

"Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the con-

tract of insurance or from time to time by regulations." (Sec. 402.)

*16. American Experience Table of Mortality.*

(a) "All calculations shall be based on the American Experience Table of Mortality and interest at the rate of three and one-half per centum per annum, except that no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues more than two hundred and forty months." (Sec. 402.)

(b) "The premium rates shall be net rates based upon the American Experience Table of Mortality and interest at the three and one-half per centum per annum." (Sec. 403.)

*17. Affidavit of Beneficiary. (Form 514.)*

(a) To secure the benefits of insurance the person who has reason to believe that he has been named as beneficiary should write to the Bureau of War Risk Insurance, Attention of the Insurance Section, Treasury Department, Washington, D.C., and ask for the necessary blanks upon which to file claim for insurance. In making this request the full name, military address, official number, if known, and date of death of the insured should be given, also the insurance certificate number, if known, and the name, address and relationship of the beneficiary. When the affidavit of the beneficiary is executed it should be returned to the Government source from which it was received.

*18. Line of Duty in Relation to Insurance.*

(a) There is no restriction as to illness or injury or death acquired in line of duty relating to insurance either before discharge or after discharge. The insurance is payable even if the insured commits suicide.

*19. Certificate of Insurance.*

(a) The certificate of insurance, or so-called policy, is not necessary in order to claim the benefits of insurance in case of the death of the insured. The fact that premiums have been deducted from the insured's pay is sufficient proof

that he was insured. The custodian of the certificate of insurance may or may not be the beneficiary. The insured may have directed in his insurance application that the certificate be sent to some one as custodian not named as beneficiary; after filing his application he may have changed his beneficiary. If two or more beneficiaries were named the certificate would be sent to one only. Thus it will happen that some persons named as beneficiaries will receive no certificates of insurance, and some persons who do receive certificates will be beneficiary for only part of the amount specified in the certificate of insurance.

#### 20. *Reduction of Policies.*

(a) It will often happen that discharged men will desire to reduce the amount of the policy. This can be done by giving written notice properly witnessed to the Bureau of War Risk Insurance. The amount of the premium sent for the month following should be for the amount of the reduced policy. Discharged men should, however, be encouraged to keep the full amount of insurance. If they, however, desire to reduce, they should not reduce the policy to an amount lower than that to which they wish to convert later on because it would be impossible to increase the insurance beyond the amount fixed at the time of reduction.

### IV. COMPENSATION.

#### 1. *Line of Duty.*

(a) "For death or disability resulting from personal injury suffered or disease contracted in the *line of duty*—the United States shall pay compensation." (Sec. 300.) No compensation shall be paid if the injury or disease has been caused by person's own willful misconduct.

#### 2. *Persons Included for Compensation.*

(a) Compensation applies to the following while in active service:

- (1) Commissioned Officers.
- (2) Enlisted Men.
- (3) Member of Army Nurse Corps (female).
- (4) Member of Navy Nurse Corps (female).

### 3. *Sound Condition.*

(a) For the purpose of the section covering compensation, said officer, enlisted man, or other member, shall be held and taken to have been in *sound condition* when examined, accepted and enrolled for service. (Sec. 300.)

### 4. *Amount of Monthly Compensation.*

#### (a) "If death results from injury.

If the deceased leaves a widow or child, or if he leaves a mother or father, either or both dependent upon him for support, the monthly compensation shall be the following amounts:

- (1) If there is a widow but no child, \$25.
- (2) If there is a widow and one child, \$35.
- (3) If there is a widow and two children, \$42.50, with \$5 for each additional child up to two.
- (4) If there is no widow, but one child, \$20.
- (5) If there is no widow, but two children, \$30.
- (6) If there is no widow, but three children, \$40, with \$5 for each additional child up to two.
- (7) If there is a dependent mother (or dependent father) \$20, or both, \$30. The amount payable under this subdivision shall not exceed the difference between the total amount payable to the widow and children and the sum of \$75. This compensation shall be payable for the death of but one child, and no compensation for the death of a child shall be payable if the dependent mother is in receipt of compensation under the provisions of this article for the death of her husband. Such compensation shall be payable whether the dependency of the father or mother or both arises before or after the death of the person, but no compensation shall be payable if the dependency arise more than five years after the death of the person." (Sec. 301.)

### 5. *Amount of Monthly Compensation in Case of Disability.*

(a) If and while the disability is total, the monthly compensation shall be the following amounts:

- (1) If the disabled person has neither wife nor child living, \$30.
- (2) If he has a wife but no child living, \$45.
- (3) If he has a wife and one child living, \$55.
- (4) If he has a wife and two children living, \$65.
- (5) If he has a wife and three or more children living, \$75.
- (6) If he has no wife but one child living, \$40, with \$10 for each additional child up to two.
- (7) If he has a mother or father, either or both dependent on him for support, then in addition to the above amounts, \$10 for each.
- (8) If he is totally disabled and in addition so helpless as to be in constant need of a nurse or attendant, such additional sum shall be paid, but not exceeding \$20 per month, as the director may deem reasonable: Provided, however, that for the loss of both feet or both hands or both eyes, or for becoming totally blind or becoming helpless and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be \$100 per month; Provided further, That where the rate of compensation is \$100 per month, no allowance shall be made for a nurse or attendant.

(b) If and while the disability is partial, the monthly compensation shall be a percentage of the compensation that would be payable for his total disability, equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated less than ten per centum.

- (1) Schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the Bureau. Ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the

rate of compensation for individual success in overcoming the handicap of a permanent injury. The Bureau shall from time to time re-adjust this schedule of ratings in accordance with actual experience.

(c) In addition to the compensation above provided, the injured person shall be furnished by the United States such reasonable governmental medical, surgical, and hospital services, and with such supplies, including artificial limbs, trusses, and similar appliances as the director may determine to be useful and reasonably necessary: Provided, That nothing in this Act shall be construed to affect the necessary military control over any member of the military or naval establishments before he shall have been discharged from the military or naval service.

(d) The amount of each monthly payment shall be determined according to the family conditions existing on the first day of the month.

*6. Medical and Surgical Treatment. (Sec. 303.)*

(a) Every person in receipt of compensation for disability shall submit to any reasonable medical and surgical treatment furnished by the Bureau whenever requested by the Bureau.

*7. Continuing Jurisdiction of Bureau. (Sec. 305.)*

(a) Upon its own motion or upon application to the Bureau it may at any time review an award, and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, may award compensation.

*8. Medical Examination within One Year. (Sec. 306.)*

(a) No compensation shall be payable for death or disability which does not occur prior to or within one year after discharge or resignation from the service, except that where, after a medical examination made pursuant to regulations, at the time of discharge or resignation from the service, or

within such reasonable time thereafter, not exceeding one year, as may be allowed by regulations, a certificate has been obtained from the director to the effect that the injured person at the time of his discharge or resignation was suffering from injury likely to result in death or disability, compensation shall be payable for death or disability, whenever occurring proximately resulting from such injury.

*9. Claim for Compensation. (Sec. 309.)*

(a) No compensation shall be payable unless a claim therefor be filed, in case of disability, within five years after discharge or resignation from the service, or, in case of death during the service, within five years after such death is officially recorded in the Department under which he may be serving: Provided, however, That where compensation is payable for death or disability occurring after discharge or resignation from the service, claim must be made within five years after such death or the beginning of such disability.

(b) Disability application is form 526 (revised form, replacing form 26).

(c) Compensation application in case of death is form 527 (revised form, replacing form 27).

To obtain these forms the beneficiary should address the Bureau of War Risk Insurance, Attention of Compensation Claims Section, Washington, D.C. When executed, these applications should be returned to the Government source from which they were received.

*10. Group of Compensation Beneficiaries.*

- (a) Widow.
- (b) Child.
- (c) Dependent Mother.
- (d) Dependent Father.
- (e) Injured Person.

*11. How Long does Compensation Continue?*

- (a) Widow—Until death or remarriage.
- (b) Child—Until 18 years old (longer if incapacitated) or until marriage.
- (c) Dependent Mother or Father—During dependency.

12. *Terms as used in Compensation.*

(a) "Widow" shall not include one who shall have married the deceased later than ten years after time of injury and shall include widower if his condition is such that if the deceased person were living he would have been dependent upon her for support. (Sec. 301.)

(b) "Wife" includes husband if dependent upon wife for support. (Sec. 302.)

V. ALLOTMENTS AND ALLOWANCES.

1. *Application to Discharged Men.*

(a) Allotments cease with date of discharge.

(b) Family allowances continue for one month after discharge even though dishonorable discharge.

(c) Allotments and allowances as provided in the Act apply to certain groups of disabled men who are undergoing Vocational Rehabilitation under direction of the Federal Board for Vocational Education.

(d) Family allowances cease from date of death in the service.

(e) No family allowances can be paid for more than one month after the termination of the present war emergency without additional legislation. (Sec. 204.)

2. *Allotment and Allowance Provisions Apply to.*

(a) Enlisted men.

(b) Commissioned Officers not included.

(c) The Philippine Scouts, the Insular Force of the Navy, and the Samoan Native Guard and Band of the Navy are not included. (Sec. 200.)

3. *Groups of Dependents.*

(a) Class "A." (Allotments are compulsory.)

(1) Wife.

(2) Child.

(3) Divorced Wife, if decreed alimony and not remarried.



(b) Class "B." (Allotments are voluntary.)

- (1) Parents.
- (2) Husband.
- (3) Brothers and Sisters.
- (4) Grandchildren.

4. *To Whom can Allotments be Made?*

(a) To any person within the groups or without the groups, or to an institution, limited only by requirements of compulsory allotments and to amount of pay due.

It has been recommended, however, that enlisted men retain at least \$7.50 per month for personal uses.

5. *Arrears of Pay.*

(a) Questions which arise after discharge concerning arrears of pay should be referred to the Auditor of the War Department, or to the Auditor of the Navy Department, Washington, D.C.

VI. VOCATIONAL REHABILITATION ACT. (Smith-Seares Act.)

(This Act replaces Section 304 of the War Risk Insurance Act.)

1. *Terms Defined as Used in this Act.*

(a) The word "Board" shall mean "Federal Board for Vocational Education."

(b) The word "Bureau" shall mean the "Bureau of War Risk Insurance."

(c) The words "said Act" as used in the Vocational Rehabilitation Act mean the War Risk Insurance Act as amended June 25, 1918.

2. *Persons Entitled to Vocational Rehabilitation* (if feasible in the opinion of the Board).

(a) Every disabled person who

- (1) Is entitled to compensation;
- (2) Is honorably discharged from the service;
- (3) Is, in the opinion of the Board, unable
  - (a) To carry on a gainful occupation;
  - (b) To resume his former occupation;

- (c) To enter upon some other occupation;
- (d) To continue successfully any occupation resumed or entered upon.
- (4) Elects to follow such a course.
- (b) Every disabled person who
  - (1) Is entitled to compensation;
  - (2) Is honorably discharged;
  - (3) Is not included under subdivision (3) of "a" above.

Such persons are entitled to

- (a) Instruction without cost in the courses of Vocational Rehabilitation under such conditions as the Board may prescribe;
- (b) Compensation;
- (c) No family allowances.

3. *Financial Provisions for Persons who are Required to Follow Elected Courses of Vocational Rehabilitation.*

- (a) Persons while following an elected course receive
  - (1) Monthly income equal to amount of monthly pay for the last month of active service; or,
  - (2) Compensation to which they are entitled under Article III. of "said Act," whichever is the greater.
- (b) If discharged as an "enlisted man" his family shall receive
  - (1) Compulsory allotment and
  - (2) Family allowance.  
(Compensation above shall be treated as monthly pay.)
- (c) The Board in its discretion will pay expense of
  - (1) Travel.
  - (2) Lodging.
  - (3) Subsistence.
  - (4) Also other necessary expenses.
- (d) No reduction in rate of compensation for individual success in overcoming the handicap of a permanent injury.

4. *Powers and Duties of the "Board."*

(a) Shall prescribe suitable courses and provide facilities to insure proper training.

(b) May certify to the Bureau willful failure or refusal of a person to follow in a manner satisfactory to the Board the prescribed course which he has elected.

(c) May determine what part of the monthly compensation due such a person may be withheld.

(d) Compensation shall be withheld only during period of failure or refusal.

(e) Compensation subject to compulsory allotment shall not be withheld.

(f) To pay in its discretion for persons required to follow prescribed courses:

(1) Expense of travel.

(2) Lodging.

(3) Subsistence.

(4) Other necessary expenses of such persons while following the prescribed courses.

(g) To provide placement in suitable occupations, using the facilities of the Department of Labor.

5. *War Department and Navy Department have Control of Medical and Surgical Work or Other Necessary Treatment Prior to Discharge.*

(a) Training employed as a therapeutic measure shall be planned with the Board acting in an advisory capacity.

(b) The War and Navy Departments shall act in an advisory capacity with the Board in the care of health of disabled soldiers or sailors after discharge, while undergoing training.

ERNEST B. LUCE.

Salem, Mass.

# THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT IN RELATION TO MEN DISCHARGED FROM MIL- ITARY OR NAVAL SERVICE AND THE END OF THE WAR.

*(This paper was prepared primarily for the information of Red Cross workers, but is here printed for the information of the bar in general.)*

## 1. INTRODUCTORY.

The Civil Relief Act is *war* legislation protecting men in *active military service* in the United States forces.

When the war ends or when men are discharged and cease to be in active military service their rights under the Civil Relief Act are affected, and, after a fixed period of time, entirely gone.

It therefore becomes necessary for every attorney to know *when* rights are affected or ended and *within what time* soldiers and sailors must act.

As this necessarily extended statement is intended primarily for reference, the following analysis will serve to indicate the proper section to consult in each particular case.

1. Introductory.
2. When Does the Civil Relief Act End?
3. Summary as to the Ending of the Act.
4. In General of the Specific Provisions of the Act.
5. Defaults.
6. Pending Litigation.
7. Statutes of Limitation.
8. Rent.
9. Installment Contracts, Leases, etc.
10. Mortgages.
11. Taxes.
12. Protection of Private Life Insurance Policies.

References in brackets hereinafter used are to the Sections of the Act.

## 2. WHEN DOES THE CIVIL RELIEF ACT END?

The Act gives its protection only to persons in military service (§ 101 (1)). *Military service* means men in *active service* in distinction to reserves and persons on the retired list (§ 101 (1)); and *active service* includes absence on account of sickness, wounds, leave, or other lawful cause (§ 101 (1)).

The "*period of military service*" ends with discharge from service, or death in service, *but in no case later than the date of the expiration of the Act* (§ 101 (2)).

The Act expires 6 months after the termination of the war (§ 603). The termination of the war dates not at all from the armistice but only from the date when the treaty of peace is officially proclaimed by the President (§ 101 (5)).

NOTE: The key to computations of time in determining the lapse of rights is "*period of military service*." Certain rights exist only during that period; others exist during that period and a stated number of days or months thereafter.

There will be one of two situations. As to men discharged prior to 6 months after the proclamation of peace, computations of time will begin from the time of their discharge.

As to men still in service 6 months after the proclamation of peace computation of time will begin as of that date and will not be computed from the date of their subsequent discharge.

A soldier or sailor reported "missing" is not to be considered dead. He is presumed to be in service. Therefore in cases affecting him the computation of time will run from the date of 6 months after the peace proclamation (§ 601 (2)).

While the Act officially ends 6 months after the proclamation of peace, it is provided that if any specified period of grace is stated or if in any proceeding under the Act a court order has been made granting rights, etc., beyond this period of time, such period is not abridged nor the order rendered void (§ 603).

NOTE: This will rarely happen except as to men who are still in service 6 months after peace is proclaimed; and where under those sections relating to mortgages and installment contracts the court is given wide powers to make any order which may be equitable. If a court has made an order ex-

tending into the future, even more than 6 months beyond peace, it is valid and stands.

### 3. SUMMARY AS TO THE ENDING OF THE ACT.

A person in active military service has various protections under the Act during the period of service and in certain instances during a fixed period of time thereafter.

Military service *ends*, and the fixed period of time begins to run—

- (a) when the man dies in service; or
- (b) when the man is discharged from service; (but not later than)
- (c) 6 months after the peace proclamation;
- (d) a missing soldier is presumed to be in service and does not fall under (a).

These various situations are concretely illustrated in connection with default judgments under heading 5.

### 4. IN GENERAL OF THE SPECIFIC PROVISIONS OF THE ACT.

Lawyers are aware that the specific provisions of the Act giving specific protections divide themselves as follows:

- 1. Litigation in the courts—
  - (a) suits where the defendant was defaulted;
  - (b) pending suits where there was no default but an absent soldier or sailor is a party either plaintiff or defendant.
- 2. The running of statutes of limitation.
- 3. Protection in situations where in peace times the creditor could enforce his rights without resort to the courts—
  - (a) rent and ejectment;
  - (b) installment contracts and leases;
  - (c) mortgages and powers of sale;
  - (d) taxes.
- 4. Protection of private life insurance policies.

The effect of death, or discharge from service, or the peace proclamation on each of these separate situations is now considered in turn.

In all cases two distinct periods of time are to be kept in mind. First, the time within which the right arises or *protection* is given; and second, the time within which *proceedings* affecting that right or protection may be begun. A clear instance of this distinction is found in the case of defaults in the following section.

### 5. DEFAULTS.

If a man absent in military service is defaulted, judgment cannot be entered except upon affirmative order of the court (§ 200). This *protection* against a judgment by default exists throughout the period of military service and 30 days thereafter.

If the defendant had a meritorious defence which his absence prevented his pleading, the judgment can be opened and the case heard (§ 200 (4)). This *proceeding* to set aside the judgment can be taken any time during service or 90 days thereafter.

Applying what has been said in 3 and 5 to concrete cases to illustrate the different times when the period of military service ends, and the difference in determining the time within which the right to *protection* arises and *proceedings* to enforce it may be begun, the following instances will serve:

Example 1.—A soldier dies in service on July 1, 1918. Under the Civil Relief Act he is protected against a default judgment until July 31, 1918. If any judgment was erroneously entered prior to July 31, 1918, his representatives have until September 29, 1918, to bring proceedings to set the judgment aside.

Example 2.—A sailor is discharged from service (after the armistice) on December 1, 1918. His protection against a default judgment runs until December 31, 1918, and his right to begin a proceeding to set aside any default judgment until March 1, 1919.

Example 3.—Suppose peace is officially proclaimed February 1, 1919. The Act expires August 1, 1919. The man on August 1, 1919, is still in service. He is dis-

charged December 1, 1919. For purposes of the Act his service terminates August 1, 1919. He is protected against default judgments only until August 31, 1919, and he can bring proceedings to set aside a default judgment only until October 30, 1919.

In this case an artificial limitation to the period of his military service is fixed by the definitions in § 101 (2), § 603, and § 101 (5).

#### 6. PENDING LITIGATION.

Where litigation is pending before a court and one party thereto is in service the case may, at any stage, be stayed.

This protection exists as to any suits brought during the period of military service or brought within 60 days thereafter (§ 201).

Execution may be stayed, and any attachment vacated or stayed in any suit brought before service, during service, or within 60 days after the termination of service (§ 203).

#### 7. STATUTES OF LIMITATION.

In computing the running time of statutes of limitation the period of military service is *excluded*. The period of military service begins as to all men in service prior to March 8, 1918, on March 8, 1918, and as to men entering service after March 8, 1918, on the actual date of their entry into service. It ends with their death, or discharge, or 6 months after the peace proclamation.

To illustrate. A enters service January 1, 1918, and is discharged April 8, 1919. The period of time excluded from the statute of limitations is only from March 8, 1918, to April 8, 1919.

B enters service June 22, 1918. Peace is proclaimed July 1, 1919. He is not discharged till July 1, 1920. The period excluded from the statute of limitations is June 22, 1918, to January 1, 1920 (6 months after declaration of peace).

#### 8. RENT.

A soldier or his dependents cannot be evicted, without court order, during the period of service. Whether the rent accrued during the period of service or not is immaterial. But one



day after the soldier's death, or discharge, or the expiration of the Act they may be summarily evicted (§ 300).

#### 9. INSTALLMENT CONTRACTS.

The protection against the rescission of installment contracts, leases, etc., without court permission extends only to defaults in making payments falling due during military service. If a payment falls due one day after discharge, and is not met, the creditor can pursue his full remedies. The soldier has no period of grace for payments (§ 301).

#### 10. MORTGAGES.

In proceedings to foreclose mortgages the soldier's right to have the proceedings stayed exists only where the breach complained of occurred prior to or during the period of service. There is no protection as to breaches after the termination of service (§ 302 (1-2)).

Powers of sale in mortgages cannot be enforced, without court permission, against a mortgagor during his service or three months thereafter (§ 302 (3)).

#### 11. TAXES.

The protection against the sale of property for taxes applies only as to taxes falling due during the period of service (§ 500 (1)).

If any property is sold for such taxes the soldier has 6 months after discharge (but not later than 6 months after the peace proclamation) to redeem. This provision does not shorten any provisions of state law (§ 500 (3)).

#### 12. PROTECTION OF PRIVATE LIFE INSURANCE POLICIES.

Application for government protection of private life insurance policies cannot be made by a soldier after his service terminates by death, discharge, or by definition 6 months after the proclamation of peace (§ 403).

Where protection has been given it covers all premiums falling due during military service and *one year* thereafter, but not later than one year after the peace proclamation (§ 405). No protected policy can be lapsed for failure to pay such premiums as they accrued.

But within one year after discharge (or within one year after the peace proclamation if that be sooner) the soldier must pay the company all premiums, with interest from the date of accrual, at the rate fixed in the policy for loans on the policy (§ 411).

If this is not done within the specified year the policy becomes totally void (§ 411). If the policy has any cash surrender value such value can be collected, but the United States has a first lien (§ 409) on the policy so that the U. S. Treasury must first be indemnified out of any cash surrender value for any loss suffered by the government in having guaranteed the payment of the premiums.

REGINALD HEBER SMITH.

DECEMBER 14, 1918.

THE OPINION OF THE SUPREME JUDICIAL COURT  
IN THE CASE OF HOFFMAN *v.* CHARLESTOWN  
FIVE CENTS SAVINGS BANK, RELATING TO  
MORTGAGEES' SALES UNDER THE SOLDIERS'  
AND SAILORS' ACT, DECIDED NOVEMBER 26,  
1918.

(Reported in *Department Reports*, Nov. 30, p. 641, and in "*Banker and Tradesman*," extra No. of Dec. 14th, p. 1.)

This is the first case under the "Soldiers' and Sailors' Civil Relief Act" to come before the Supreme Judicial Court of Massachusetts. The effect and scope of the act, based as it is solely upon the war power of Congress, was so sweeping in its provisions granting new general powers and imposing new general duties upon all the federal and state courts of every description, that it is not surprising that in the first opinion under it the court should inadvertently have used language which has caused wide-spread comment and much uncertainty in the minds of the bar. As this uncertainty relates to the branch of the law affecting titles to real estate, it produces serious results and at the request of a number of members of the bar, it seems desirable that the exact point of the decision should be made clear and various passages in the opinion should be discussed with a view to clearing away some of the uncertainty and thus avoiding unfortunate practical results which it is probable the court did not intend to produce.

Accordingly, the opinion is here printed in full with the special passages referred to printed in italics, and a note is added discussing those passages for the consideration and assistance of the bar.

In the first place, it should be clearly understood in reading the opinion that the bill was brought to restrain a mortgagee from completing a sale with a purchaser under the power of sale contained in the mortgage. The decision, therefore, did not deal with the case of a bona fide purchaser of the title after the deed had been delivered without notice of the undisclosed implied\* trust in favor of a soldier in service.

\* The trust appears to have been an implied trust arising from the payment of consideration by the son who foreclosed a third mortgage by sale, under the power, to his mother, thus paying the consideration by extinguishing his third mortgage claim.

The opinion was as follows:

THE OPINION OF THE COURT.

This is a bill brought in behalf of an officer in the military service of the United States outside the Commonwealth to get relief from the foreclosure of a mortgage made in violation of clause (3) of s. 302 of the Act of Congress dated March 8, 1918, entitled The Soldiers' and Sailors' Civil Relief Act.

The case was sent to a master. From his report it appears that "expecting to be called for service in the army" the plaintiff by the foreclosure of a third mortgage conveyed the land and buildings here in question to his mother subject to a first mortgage to the defendant as well as to a second mortgage to a third person. Thereafter it was agreed between the plaintiff and his mother by "an oral trust and general agreement" that the property should be his unless he failed to return from the war and in that case it should be hers. Within a month the plaintiff received orders to report for active duty on March 8, 1918. On that day he did report and has been on active duty since that time as lieutenant in the United States Army.

The defendant's first contention is that s. 302 here in question is "limited to property used by a soldier or sailor or by his dependents for business or dwelling purposes." But there is no such limitation in that section. The contention is based on a note made by persons who assisted in making the draft of the bill which resulted in the act here in question, see Special April Number of the Massachusetts Law Quarterly at p. 212. It would seem from this note that the original draft of s. 302 contained such a limitation. But after the bill was introduced in the House of Representatives the Judiciary Committee "produced a new bill," see Massachusetts Law Quarterly, *ubi supra*, at p. 204. The explanation would seem to be that the note which applied to the draft has been published as a note to the act and the limitation in question never became a part of the section as it was enacted.

The next contention of the defendant is based upon a finding of the master, that the bank had no notice or reason to suppose that the plaintiff was the owner of the property in question. *There is nothing in the section here in question*

*which limits its provisions to owners of record or to cases where the mortgagee in fact knew or had reason to know who the owner of the property was. The act in terms includes every case where the mortgaged property is "owned by a person in the military service at the commencement of the period of military service and [is] still so owned by him." If the section is construed to apply in every case where the owner is in the military service of the United States, whether the mortgagee did or did not know who the owner was, it would seem on the face of it to be a drastic statute. The fact of the owner (when he is ascertained) being or not being in the military service of the United States is a fact which it is at least as hard for the mortgagee to find out as it is for the mortgagee to find out who the owner of the property is. Yet without question there is no such limitation as to that fact. When the relief given by clause 3 of s. 302 is taken into account the section construed as stated above is not a drastic one. The section does not forbid the foreclosure of mortgages on property owned by persons in the military service of the United States. What the section does forbid is the foreclosure of such a mortgage under a power of sale (contained in it) "unless [the sale under the power is made] upon an order of sale previously granted by the court and a return thereto made and approved by the court." Clause (3) of s. 302 was enacted to secure to every person in the military service of the United States who owns property subject to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section that if that be the true construction of it the result is that until the termination of the time specified in the act no mortgage can be foreclosed by any mortgagee except under an order of court and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act. We are of opinion that since this is the result of the true construction of the act this must be taken to have been the intention of Congress.*

The next contention of the defendant is that on the findings of the master the father of the plaintiff who was the plaintiff's agent in the care of the property in question had

full knowledge of the foreclosure sale and acquiesced in and in fact approved of it. The protection given by the act is given to the person in the military service of the United States. *The right given to him is personal to him. For that reason the knowledge, acquiescence and approval of the plaintiff's agent for the care of the property is of no consequence.*

There are three matters which ought not to be passed by, although they have not been referred to in argument.

The act applies to persons in the military service of the United States who are equitable as well as to those who are legal owners of property covered by mortgages within the act. *The plaintiff was the equitable owner of the property here in question although the trust and agreement which brought his equitable ownership into being was within the statute of frauds (R.L., c. 74, s. 1, and R.L., c. 147, s. 1) and the statute of frauds was not satisfied. The defence of the statute of frauds is a defence which is personal to the maker of the contract and cannot be set up by a third person (Cahill v. Bigelow, 18 Pick. 369; Ames v. Jackson, 115 Mass. 508; Bullard v. Smith, 139 Mass. 498; Bailey v. Wood, 211 Mass. 37). As against third persons a contract within the statute of frauds is effective although the statute is not satisfied.*

*If it is to be taken that except under special circumstances there is no jurisdiction in equity in this Commonwealth to foreclose a power of sale mortgage (see Old Colony Trust Company v. Great White Spirit Co. 178 Mass. 92) the existence of The Soldiers' and Sailors' Civil Relief Act is a special circumstance which is sufficient to give the equity courts of the Commonwealth jurisdiction to foreclose such mortgages within the time specified in the act.*

There can be no question of the constitutionality of the act. It is a war measure within the power of Congress, therefore the supreme law of the land. For this reason it governs the foreclosure of mortgages on real estate within the territorial limits of the Commonwealth.

The decree appealed from must be reversed and a decree entered enjoining the defendant from conveying the property covered by the mortgage here in question to the person who bought it at the attempted foreclosure sale set forth in the bill. The plaintiff is entitled to his costs.

Decree accordingly.

## DISCUSSION AND EXPLANATION OF THE OPINION.

The section of the Soldiers' and Sailors' Act relating to mortgages is as follows:

SEC. 302. (1) *That the provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.*

(2) *In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may, after hearing in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—*

- (a) *Stay the proceedings as provided in this Act; or*
- (b) *Make such other disposition of the case as may be equitable to conserve the interests of all parties.*

(3) *No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court.*

Taking up now the passages in the opinion printed above in italics, there seems to be no doubt that the act as stated by the court is constitutional as within the "war power" of Congress. The fact which furnishes the basis for this exercise of the war power is the fact of "service" of the owner of the equity. The procedure provided by the act to secure protection of soldiers and sailors in service seems to be only

such reasonable procedure as is necessary for that purpose and in construing the act it seems necessary to assume that it was not intended to go beyond such reasonable requirements as were necessary to secure such protection without opening the way for unsettling titles to real estate by subjecting innocent purchasers to serious loss from claims which they could not, by any reasonable inquiries, ascertain or guard against. There seems to be no reason to suppose that the act was intended to open up avenues of fraud or something very near it under the guise of the protection of men in service.

This seems to be clear from the last sentence in Par. 4 of Sec. 200 which, after providing that a man in service who has been prejudiced by reason of his service in making a defense in any proceeding under that section, continues as follows:

“Vacating, setting aside, or reversing any judgment because of the provisions of this act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.”

That sentence does not apply in terms to a case of a sale under a power in a mortgage exercised without permission of the court, but it does show that the framers of the act remembered the possibility that the bona fide purchaser might require some protection (cf. also § 600).

In connection with this constitutional question, however, an important principle of construction should be remembered. The provision in the federal statute subjecting an irrevocable power of sale in the mortgage to the requirement of a court order in soldier and sailor cases, although within the constitutional “war power” of Congress, nevertheless operates as an impairment of the contract made by the mortgagee in a manner which may seriously effect the value of the security. While the provision in the federal constitution against the impairment of contracts is a restriction only upon the states and there is no such restriction on the powers of Congress, nevertheless, the legislative impairment of contracts is an act of such a character that even under the “war power” an act of Congress should be so construed that the resulting impairment of contracts should not exceed the reasonable necessities of the situation which the particular war legislation is de-



signed to meet, which is in this case the reasonable protection of soldiers and sailors within the limits of fair dealing.

Furthermore, if the act was intended to go beyond the reasonable necessities of protecting the soldiers and sailors and should be construed as making an arbitrary requirement in regard to real estate transactions in the several states having no relation to the policy of protecting soldiers and sailors, it might get beyond the bounds of constitutionality even under the war power, for there seems to be no ground on which Congress can force a mortgagee into court except to protect some *particular* soldier or sailor. This is another reason why the act should be construed in such a way as to fit in to the established and reasonable policy of protection of honest people embodied in the recording acts in accordance with the "cardinal rule of construction" that a statute will not be construed so as to violate the constitution "unless its language imperatively demand it." (See *Knights Templar's Code v. Jarmon*, 187 U.S. 197, 205; *U. S. v. Del. & Hudson Co.*, 213 U.S. 366, 407.)

In the Hoffman Case the decision is sound because *the trust appears to have been an implied trust arising from the payment of consideration (involved in the plaintiff's foreclosure of his third mortgage, to his mother) expressly excepted from the statute of frauds by R.L., c. 147, §1, and was brought to the attention of the court before the deed was actually delivered by the mortgagee to the purchaser at the sale under the power. These facts furnished the ground for enjoining the completion of the sale.*

#### THE PASSAGES WHICH HAVE CAUSED UNCERTAINTY AT THE BAR.

The passages which have caused the uncertainty of the bar are those which suggest that no mortgagee's sale could be valid without the order of the court against a man in service claiming under an undisclosed legal or equitable title of which there was no evidence of record.

The court says that the result of the act is that:

"No mortgage can be foreclosed by any mortgagee except under an order of the court . . . for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act,"

but this statement seems to go farther than the court intended, partly, perhaps, because it is stated from the point of view of the mortgagee rather than from the point of view of the purchaser at the mortgagee's sale. The court also says, in a later passage, that the right to protection provided by the act given to the man in service

“ . . . is personal to him. For that reason the knowledge, acquiescence, and approval of the plaintiff's agent for the care of the property is of no consequence.”

Can this be so if a decree of the court permitting the mortgagee's sale would protect the purchaser at the sale in the manner suggested by the court in its previous statement?

Let us assume that in the Hoffman Case the mortgagee had applied to the Supreme Court by bill in equity for leave to exercise the power of sale, naming as defendant the mother of the plaintiff in the Hoffman Case, who was the record owner of the equity of redemption. Let us assume that following the same course which the father and mother of the plaintiff appear to have followed in the Hoffman Case, the defendant thus named did not disclose in her answer the implied trust for their son, but allowed the proceeding to go by default so that the Supreme Court issued an order permitting the mortgagee to sell under the power. Suppose the sale were completed and the deed delivered under the court order. Suppose, after all of this had happened, the son, claiming under the undisclosed implied trust, had appeared and on the ground that he was not a party to the suit in the Supreme Court and that as the question arose as to his rights under the federal statute he was not bound to apply to the Supreme Court of Massachusetts or to attempt to intervene in the case which had already been decided, brought suit by bill in equity in the Federal Court, alleging in the words of the opinion above referred to that “the knowledge, acquiescence, and approval of his agent” or trustee was of no consequence, and asking that the sale under the power be set aside and that he should be allowed to redeem. Is it clear that there would have been any defense to his proceeding in the Federal Court?

If there would be no defense because of the fact that he was never a party in the previous suit, then the innocent purchaser of the title would not be protected any more than he

would have been if the power of sale had been exercised without resort to the court in the first place.

But, is there anything in the act which suggests an intention to subject the purchaser at such sales to undisclosed claims in favor of anybody in the world and thus upset entirely the policy of the recording acts of the various states? Is it not true that the real effect of the act is to put the purchaser at a mortgagee's sale under a power on his inquiry as to the fact of service of the person who at the time of the sale is the *record holder* of the title or has an equitable interest (as one of a class of heirs or beneficiaries, etc.) *disclosed by the record* in the property involved? It is submitted that is the extent of the reasonable interpretation of the act and, if that is so, then there seems to be no reason why a mortgagee's sale should not be conducted under the power without resort to the court if the parties are satisfied that the record owner of the equity of redemption at the time of the deed was not in service.

It is submitted that the absolute language of the last paragraph of Sec. 302, which says that:

"No sale under a power of sale . . . shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court,"

must be thus construed in order to accomplish the double purpose of affording reasonable protection to the soldiers and sailors without opening the door to unreasonable opportunities for fraud against an innocent purchaser under the shield of the act. In other words, reasonable protection under the act for the soldiers and sailors does not require a ruling which allows them to mislead innocent people by failing to give reasonable notice on the record of the fact of their claims as other honest men are required to do so that the existence of those claims may be discovered by reasonable inquiry at the record office.

If it be true that an innocent purchaser at a mortgagee's sale is not protected against undisclosed trusts for soldiers and sailors, then it must also be true that an innocent purchaser from the record owner of land not subject to a mortgage will not be protected against an undisclosed trust or an

unrecorded deed in favor of a soldier or sailor, and all conveyancing of real estate in the country will be rendered uncertain because nobody can get a good title of any kind from anybody. It cannot be that Congress intended such a result. Surely, Congress did not intend to go so far as to spoil every real estate transaction in Massachusetts by making every conveyance since March 8, 1918, a bad title subject to any unrecorded claim to which any one by oral evidence could attach a soldier or a sailor. The object of the act was to protect the soldier or the sailor and not to stop the business of dealing in real estate or to render real estate unsaleable in the hands of its honest owner.

A mortgagee holding an irrevocable power of sale and complying with it, is in exactly the same position so far as dealing with innocent third persons and their right to deal with him are concerned as an absolute owner of the land and, if undisclosed trusts for soldiers or sailors can be enforced against a purchaser from such mortgagee, they can also be enforced against a purchaser from a person who appears to be the absolute owner. The act does not say that some undisclosed person holding an undisclosed deed or an unrecorded right to redeem under an unrecorded arrangement which makes an equitable mortgage out of the apparent absolute title can enforce these claims against an innocent purchaser of absolute title.

By R.L., c. 147, s. 3, "No trust concerning land, whether implied by law or created or declared by the parties, shall defeat the title of a purchaser for a valuable consideration, and without notice of the trust." As to such a person the trust is invalid and without effect, like an unrecorded deed of conveyance, which is effectual between the parties (*Dole v. Thurlow*, 12 Met. 157, 162), but is inoperative as against purchasers and creditors without notice (*Dow v. Whitney*, 147 Mass. 1, 6). The opinion indicates no intention to change this rule.

Sec. 601 provides that it shall be the duty of certain officers of the army or navy to furnish certificates which shall, when produced, be *prima facie* evidence as to any of the following facts stated in such certificate.

"That a person named has not been or is or has been in military service; the time when, etc."

This section indicates that the act intended to give protection only to those persons whose interest in the property was known, because such officers could only certify as to such facts in regard to specified persons whose names were furnished to them.

Some apprehension has been created by the following language:

"The defence of the statute of frauds is a defence which is personal to the maker of the contract and cannot be set up by a third person (*Cahill v. Bigelow*, 18 Pick. 369; *Ames v. Jackson*, 115 Mass. 508; *Bullard v. Smith*, 139 Mass. 498; *Bailey v. Wood*, 211 Mass. 37). As against third persons a contract within the statute of frauds is effective, although the statute is not satisfied."

The cases referred to establish that the maker of the contract is not under any obligation to repudiate it for the benefit of a third person, and that, if he chooses to stand to it, his rights against others will be the same as if it were binding on him. But it is a considerable extension of that doctrine to say that the other party, who could not have enforced the contract against him, can insist on rights under it as against third persons in the same manner as if it were enforceable against the maker, who might afterwards dispute his liability on the ground of the statute. This proposition would be contrary to the law as laid down in *Curry v. Dorr*, 210 Mass. 430, 432, where the court said: "The record title . . . having stood in the name of one Barlow under a conveyance in fee, absolute upon its face, *with no proof that the consideration had been furnished by the defendant*, parol evidence, that the parties understood, that Bangs should retain the beneficial interest, and receive the rents and profits, was *incompetent* under our statute relating to the creation of trusts in land." It is not probable that it was intended to go so far as to say that, if the owner of land, who had orally agreed to sell it to another or to hold it in trust for him, should sell it to a third person with notice of the oral agreement, the purchaser would be unable to set up the statute of frauds in any proceeding to enforce the agreement. The purchaser would in such a case be subject only to the same equities and bound only to do the same acts as the

person that conveyed to him (1 Story, Eq. s. 396; Maitland, Eq. 84, 117).

It is submitted that the bar may feel confident that the court did not decide or intend to decide that an innocent purchaser at a mortgagee's sale after the deed had been delivered and the transaction completed was subject to attack based on claims the nature of which no examination of the record could disclose, or that the beneficiary of an oral trust has any greater rights against third persons than he has against the trustee.

F. W. GRINNELL.

SUPPLEMENTARY NOTE ON THE NATURE OF THE JURISDICTION, AND THE JURISDICTIONAL FACTS.

It is also suggested by the court that the fact of the Soldiers' and Sailors' Relief Act "is a special circumstance which is sufficient to give the equity courts of the commonwealth jurisdiction to foreclose mortgages within the time specified in the act." But is this quite so? The act of Congress does not seem to be a "circumstance" on which the general equity jurisdiction of Massachusetts courts of equity depends. Is it not rather, as the court says in the subsequent paragraph of the opinion, "the supreme law of the land" which confers under the "war power" upon every court of Massachusetts, as well as of the federal government (whether it be the Supreme Court or the Police Court, and whether or not it has equity jurisdiction in regard to other litigation) the power to deal in an equitable manner with these soldier and sailor cases?

It is provided in Sec. 101 of the act that:

"The term 'the court' as used in this act shall include any court of competent jurisdiction of the United States or of any state whether or not a court of record."

Accordingly, any court exercising the powers under this act seems to be exercising special statutory powers and is not exercising the equity jurisdiction of the Massachusetts Courts.

Bearing this in mind and considering further the suggestion in the opinion of the court that "No mortgage can be foreclosed by any mortgagee except under an order of the court . . . for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act," it has been suggested that "if a mortgagee began a proceeding in court for leave to foreclose and did not allege that the owner was in military service, the court would have no jurisdiction and, if the plaintiff knew that the owner was not in military or naval service, how could he allege that he was? The owner of the equity might be a woman (who was not a yeowoman), or a corporation, or a person ninety years old,"—or the trustee of a real estate trust or syndicate, all the beneficiaries of which were known not to be in service and to be beyond the age of service.

Since Clause 3 of Sec. 302 merely provides that "No sale under a power of sale contained in any *such* obligation shall be valid if made during the period of military service, etc., unless upon an order, etc.," and since the word *such* refers only to "obligations originating prior to" March 8, 1918, "and secured by mortgage, etc., . . . upon . . . property owned by a person in . . . service, and arising out of nonpayment . . . occurring prior to or during the period of such service," it seems that the allegation of such service is a jurisdictional fact which must be alleged and proved and that, until that fact appears to the satisfaction of the court, the act does not either charge or empower the court to deal with the absolute right of property of an absolute owner of record or mortgagee with an irrevocable power.

The act appears to contemplate that before a mortgagee holding a power, which according to its terms does not call for any assistance from any court, goes into court for the protection provided by this act in Clause (b) of sub-division 2 of Sec. 302 for "the interest of *all* parties," he shall find out who the owners of the equity are and, if necessary, by securing affidavits from military officers, under Sec. 601, whether any of them are in service and, if they are not in service, the jurisdiction of the court does not arise. *The section does not provide that a mortgagee may apply to the court for the purpose of finding out whether there is anybody in service connected with the property in order that he may get a decree in rem.* It is, of course, possible that if under peculiar circumstances there was some evidence that somebody connected with the property was in service and either the fact of his interest or the fact of his service was uncertain, a mortgagee might by bill for discovery in a court of equity or by interrogatories in a proceeding for foreclosure endeavor to ascertain the jurisdictional facts upon which to seek the protection of the court. But, such proceedings would not be proceedings under this statute. They could be merely in aid of proceedings under the statute and the statute does not contemplate such proceedings in the absence of some evidence.

It is submitted that if the mortgagee obtained a certificate from the proper officers, under Sec. 601, that the record owner of the equity of redemption was not in service, there would be no basis upon which he could apply to the court, unless he had actual notice that some soldier or sailor had an interest which did not appear of record.

The proceeding in court contemplated in connection with a power of sale necessarily differs to some extent from other proceedings in court covered by the act, because in most, if not all, the other proceedings referred to it is necessary to apply to the court to obtain relief and the question of protecting the soldier or sailor does not arise until the matter gets into court; whereas, the use of the word "such" in sub-division 3 (of Sec. 302) means that the court is to be resorted to only where there is a soldier or a sailor involved, and that means, as already pointed out, that this fact



must be ascertained in advance because it is a jurisdictional fact. This being the case, the soldier or the sailor who may be interested in some undisclosed claim to the property is in the same position as the soldier or the sailor, under the last sentence in Par. 4 of Sec. 200, who may have been prejudiced by reason of his service in making a defense in any proceeding under that section and, if so, he is given a right to apply to the court in which the case is pending to reopen the proceedings, provided that such action "—shall not impair any right or title acquired by any *bona fide* purchaser for value."

Accordingly, this bears out the suggestion already made that such undisclosed soldier or sailor may apply to a court for leave to redeem from a purchaser at a mortgagee's sale *if he can charge such purchaser with notice of his rights, but not otherwise.*

If the equity of redemption was held by a corporation, of course the shareholders would have no interest in the real estate. If it was held by a real estate trust, the shares in which were distributed among a great many people in the same way as corporate shares are held so that their number created a complication—in such a case, the facts might be such that the assistance of a court might be needed in addition to the powers provided by this act, and this would furnish an example of a case in which the mortgagee could not reasonably ascertain whether all the persons beneficially interested were or were not in service *if it should be considered necessary to apply to a court for leave to sell under the power.* Or it might be necessary to apply to a court of equity to find out whether the powers of management and sale of the property left a right in any beneficiary of such trust to special protection, or whether the shares in such a trust were so far like corporate shares that the "interests of *all parties*" were sufficiently represented by the trustees of the equity of redemption. It seems clear that in the ordinary case of such a trust, the interests of the shareholders have been so far committed to the trustees that the mortgagee could sell under his power without a court order even if it appeared that some of the shareholders were in service. If, however, one of the trustees was in service a different question might arise.

In the case of a mortgage of personal property, the recording acts of course do not apply, but the principle of notice seems to apply in the same way for the purpose of construction in the practical application of the act.

Although the court says in general terms that the act "includes every case where the mortgaged property is owned by a person in service at the commencement of his service," this general language is not to be understood, of course, as suggesting that the act applies to mortgages made after March 8, 1918, for the statute says so clearly that it applies "only to obligations originating prior to the approval of this act," that the court naturally did not consider it necessary to refer to that fact.



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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS  
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*(My commission expires October 6, 1922.)*

[SEAL]



